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No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Service Employees International Union, Local 32BJ files this brief *amicus curiae* in support of respondents with the consent of the parties as provided for in the Rules of this Court.[1] Local 32BJ is the union-party to the collective bargaining agreement at issue in this case. Local 32BJ represents some 90,000 workers, primarily in the property service industry, in the Mid-Atlantic region stretching from Northern Virginia to Con-

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

necticut. The Union's New York City membership includes some 50,000 workers covered by three separate multiemployer collective bargaining agreements with the Realty Advisory Board on Labor Relations, Inc., including the Contractors Agreement at issue here.

SUMMARY OF ARGUMENT

The petitioners 14 Penn Plaza LLC and Temco Service Industries, Inc. contend that the respondents Steven Pyett, Thomas O'Connell, and Michael Phillips are bound to arbitrate their Age Discrimination in Employment Act claims in this case by the Contractors Agreement between Service Employees International Union, Local 32BJ and the Realty Advisory Board on Labor Relations, Inc., a multiemployer collective bargaining agreement covering Pyett *et al.* and their employer, Temco. This brief, submitted on behalf of the union-party to that agreement, demonstrates that the agreement does *not* bind Pyett, *et al.* to arbitrate the ADEA claims brought in this case.

The Contractors Agreement provides that employment discrimination claims, including statutory claims, are "subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations." Pet. App. 48a. However, the "grievance and arbitration procedure [in] Articles V and VI" of the Contractors Agreement provides only for arbitration of "differences arising between the parties," i.e., between the Union and a covered employer, and that employee grievances may be brought to arbitration only as "Union claims [which] are brought by the Union alone." Pet. App. 43a, 46a.

There are no "differences . . . between the parties" with respect to the ADEA claims in this case. Both

the Union and the employer have concluded that those claims are lacking in merit. Based on its view of the merits, the Union refused to bring the ADEA claims to arbitration. That being so, "arbitration [of the ADEA claims] . . . in the manner provided for in [the] agreement," 9 U.S.C. § 4, is not available here and the courts below correctly denied the Federal Arbitration Act petition to order arbitration.

ARGUMENT

This case comes to the Court on an interlocutory appeal under § 16(a) of the Federal Arbitration Act from "an order . . . denying a petition under section 4 of th[e] Act to order arbitration to proceed." 9 U.S.C. § 16a.[2] The order in question denied an FAA § 4 petition by 14 Penn Plaza LLC and Temco Service Industries, Inc. ("Defendants") to order Steven Pyett, Thomas O'Connell, and Michael Phillips ("Plaintiffs") to arbitrate their Age Discrimination in Employment Act claims against the Defendants. The Plaintiffs are building service workers employed by Temco who worked at the 14 Penn Plaza office building in midtown Manhattan in a bargaining unit represented by the Service Employees International Union, Local 32BJ and who filed an ADEA lawsuit against the Defendants.

Section 4 of the Federal Arbitration Act provides for the enforcement of "a written agreement for arbitration" by "an order directing that such arbitration

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[2] The court of appeals below proceeded on the assumption that it had jurisdiction over the interlocutory appeal under the FAA. *See* Pet. App. 5a, 7a. While the question was not raised below, we would note that it is not settled that the FAA applies to collective bargaining agreements covered by the Labor Management Relations Act. *See International Ass'n of Machinists v. Goodrich*, 410 F.3d 204, 207 n. 2 (5th Cir. 2005).

proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The "written agreement for arbitration" invoked by the Defendants in moving to compel arbitration is the no-discrimination clause contained in the multiemployer collective bargaining agreement covering Temco negotiated by Local 32BJ and the Realty Advisory Board on Labor Relations, Inc. *See* Pet. Br. 10, 40.

As we show herein, the multiemployer collective bargaining agreement covering Temco does not constitute a "written agreement for arbitration" of the Plaintiffs' ADEA claims against the Defendants. That being so, the courts below correctly denied the Defendants' petition for an order directing that the Plaintiffs proceed to an arbitration of their ADEA claims.

We begin by carefully reviewing the terms of the Local 32BJ/Realty Advisory Board collective bargaining agreement and the nature of the agreement's grievance-arbitration procedure. We then describe the particular employment dispute that gave rise to this case and the Union's handling of the grievance arising out of that dispute. Finally, we show that the collective bargaining agreement does not provide for arbitration of the Plaintiffs' ADEA claims here.

I. THE COLLECTIVE BARGAINING AGREEMENT

The collective bargaining agreement at issue in this case is the 2002 "Contractors Agreement" between Local 32BJ and the Realty Advisory Board on Labor Relations, Inc.[3] The Realty Advisory Board

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[3] The 2002 Contractors Agreement was in effect from January 1, 2002 to September 30, 2004 and covers the period during which the events giving rise to the claims in this case occurred.

negotiated that agreement on behalf of its member cleaning contractor employers in the building services industry, which included Temco Service Industries, the direct employer of the Plaintiffs. Pet. App. 15a. The Contractors Agreement is one of several multi-employer collective bargaining agreements between Local 32BJ and the Realty Advisory Board covering different sectors of the building services industry in the New York City area.

The 2002 Contractors Agreement was the first Local 32BJ/Realty Advisory Board collective bargaining agreement specifically covering the cleaning contractor segment of the New York City building services industry. Following the general pattern of the other Local 32BJ/Realty Advisory Board agreements, the Contractors Agreement sets the rates of pay, seniority, the amount and conditions of employment leave, the manner of filling vacancies, and myriad other basic terms and conditions of employment. Of particular concern here are the Contractors Agreement's grievance and arbitration procedures and its no-discrimination provision.

A. Article V. Grievance Procedure

Article V of the Contractors Agreement creates a grievance procedure through which Local 32BJ and the covered employers "endeavor to adjust" *both* "issues not covered by and not inconsistent with any provision of th[e] Agreement[,] which the parties are not required to arbitrate" *and* "any issue between the parties which under th[e] Agreement the parties are

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The Joint Appendix (JA 47-48) and Petition Appendix (Pet. App. 43a-48a) contain excerpts from the 2005 collective bargaining agreement that went into effect in October 2004 after the events that give rise to this case. The relevant terms of the 2002 and 2005 agreements are identical.

obligated to submit to the Arbitrator."[4] With certain exceptions not pertinent here, grievances must be filed within one hundred and twenty days of the subject occurrence.

There are two steps to the grievance procedure. The first step is a meeting between ground-level representatives of the covered employer and of Local 32BJ. The second step is a meeting between higher-level employer and Union representatives, which may include the parties' respective attorneys. Formal mediation may occur at the second step, especially where arbitrable grievances are concerned, with the Realty Advisory Board and Local 32BJ sharing the costs equally. Local 32BJ controls the presentation of grievances, on its side, at each step and determines which of those grievances will advance through the steps of the grievance procedure. Affected employee-grievants may or may not attend the grievances meetings depending on whether Local 32BJ decides their presence is warranted.

Grievances concerning interpretation or application of the terms of the collective bargaining agreement that have not been resolved may be taken to arbitration at the request of either Local 32BJ or the affected employer. While Local 32BJ has the right to request arbitration of grievances on its side, the individual employee-grievants have no such right.

B. Article VI. Arbitration

Article VI provides for "a Contract Arbitrator to decide all differences arising between the parties as to interpretation, application or performance of any part of th[e] Agreement and such other issues as the

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[4] Articles V of the agreement setting forth the contractual grievance procedure is reproduced in Appendix A to this brief.

parties are expressly required to arbitrate before him under the terms of this Agreement." Pet. App. 43a.[5] The arbitration procedure is invoked by "either party . . . serv[ing] written notice upon the other that the grievance procedure has not resulted in an adjustment." Pet. App. 44a.

The arbitration clause makes clear that "[a]ll Union claims are brought by the Union alone" and that "no individual [may] compromise or settle any claim without the written permission of the Union." Pet. App. 46a. The Union, however, may compromise or settle any claim, including by withdrawing a grievance from arbitration, without the permission of the affected employee-grievant.

When Local 32BJ takes a grievance to arbitration, the Union controls the presentation of the grievance and of the supporting evidence at the hearing. The arbitrator is required to "conduct the hearing" even if "the Union appears at [the] arbitration without the grievant." Pet. App. 46a. If the grievant is present, he may not participate in the hearing without the Union's permission. On occasion, as in this case, the Union allows the grievant to be accompanied by his personal lawyer. The grievant's lawyer may not, however, play an independent role at the hearing without the Union's permission.

By the terms of Article VI, "[t]he procedure herein outlined in respect to matters over which the Contract Arbitrator has jurisdiction [is] the sole and exclusive method for the determination of all such issues." Pet. App. 45a. The Contract Arbitrator is required to issue his award within thirty days of the close of the hearing and has "the power to grant any

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[5] Article VI is reproduced at Pet. App. 43a-47a.

remedy required to correct a violation of th[e] agreement." Pet. App. 45a. "[T]he award of the Arbitrator" on matters submitted for decision is "final and binding upon the parties and the employee(s) involved." *Ibid.*

The Contract Arbitrator is drawn from a panel of twelve named arbitrators administered by an entity called the "Office of the Contract Arbitrator-Building Service Industry." Pet. App. 47a. The Office of the Contract Arbitrator is a partnership between Local 32BJ and the Realty Advisory Board. The Office of the Contract Arbitrator assigns arbitrators under a number of the collective bargaining agreements between Local 32BJ and the Realty Advisory Board, not just under the Contractors Agreement at issue here. In recent years, on average the Office of the Contract Arbitrator has assigned over 700 cases for arbitration each year, over half of these cases settled at some point prior to a final decision by the arbitrator.

The Office of the Contract Arbitrator has its own offices and administrative staff. The costs of maintaining the Office of the Contract Arbitrator are shared equally by Local 32BJ and the Realty Advisory Board. Pet. App. 47a. In addition to sharing the costs of maintaining the Office, the Union and the Board share equally the cost of each arbitration proceeding arising under their agreements. Pet. App. 44a. The Office of the Contract Arbitrator is available to assign arbitrators for arbitrations involving employers that are not members of the Realty Advisory Board and are not covered by any of the Board's collective bargaining agreements with Local 32BJ; those nonmember employers are charged a per-arbitration fee to cover the nonmember em-

ployer's share of the arbitration costs.

The twelve arbitrators on the Office of the Contract Arbitrator panel are chosen by mutual agreement between Local 32BJ and the Realty Advisory Board. Either Local 32BJ or the Board may strike an arbitrator from the panel at any time for any reason, in which case a successor to the struck panel member may be selected by mutual agreement. Pet. App. 47a.

C. Article XIV. Section 30. No Discrimination

Section 30 of Article XIV provides that "[t]here shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law." Pet. App. 48a.[6] Section 30 adds that discrimination claims, "including . . . claims made pursuant to . . . the Age Discrimination in Employment Act, . . . or any other similar laws . . . shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations." *Ibid.* And, Section 30 concludes by directing that "[a]rbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination." *Ibid.*

The no-discrimination clause in the Contractors Agreement is identical in all material respects to the no-discrimination clauses in the other Local 32BJ/Realty Advisory Board collective bargaining agreements.[7] And, as the Defendants correctly ob-

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[6] Article XIV, Section 30 is reproduced at Pet. App. 48a.

[7] Some of the no-discrimination clauses do not contain the reference to New Jersey and Connecticut law that appear in the Contractors Agreement. All of the clauses contain the same reference to New York law.

serve, the bargaining history behind the present formulation of that clause is pertinent. *See* Pet. Br. 6.

The various collective bargaining agreements between Local 32BJ and the Realty Advisory Board have long contained no-discrimination clauses. Typical of the earlier versions of this clause were the no-discrimination clauses in the 1994 Apartment Building Agreement and the 1996 Commercial Building Agreement, which provided simply:

> "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability of an individual in accordance with applicable law, national origin, sex or union membership."

The first reference to arbitration of discrimination claims, including claims of discrimination in violation of law, appeared in the 1997 Apartment Building Agreement, which contained the new language indicated by italics here:

> "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability of an individual in accordance with applicable law, national origin, sex or union membership, *or any characteristic protected by law. Any disputes under this provision shall be subject to the grievance and arbitration procedure (Articles V and VI).*" (emphasis added)

The no-discrimination clause was further amended in the 1999 Commercial Building Agreement, with the new language added in that round of negotiations indicated by italics here:

> "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin,

> sex, union membership, or any characteristic protected by law, *including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, or any other similar laws, rules or regulations. All such claims* shall be subject to the grievance and arbitration procedure (Articles VII and VIII) *as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.*" (emphasis added)

During negotiations for the 2000 Apartment Building Agreement, the Realty Advisory Board made the following proposal:

"No Discrimination:

> "(a) Amend Article XVII, Section 23 [the no-discrimination clause] to conform to the language of the 1999 Commercial Agreement.
>
> "(b) Add fourth paragraph to Article IV [the management rights clause] indicating that nothing in this Agreement shall be construed to prevent the Employer from requiring, as a condition of employment, that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement."

Local 32BJ agreed to paragraph (a) of the Realty Advisory Board proposal, while expressly conditioning its agreement on the understanding that the "modifications [to the language of the no-discrimination clause] were not intended to alter or change the parties' understanding set forth in the

1997 Apartment Building Agreement" and on the parties' "joint commitment to diversify the panel of arbitrators to better reflect the Union's membership, to develop procedures appropriate for such cases, and to evaluate our experience in connection with these claims."[8]

But Local 32BJ refused to agree to paragraph (b) of the Board's proposal – allowing the employers to "requir[e], as a condition of employment, that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement" – and the Board withdrew that part of its proposal.[9]

In 2002, when Local 32BJ and the Realty Advisory Board negotiated the first Contractors Agreement covering the Board's cleaning contractor members, the parties followed the pattern set by the previous

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[8] The contemporaneous side-letter stating the Union's conditions for agreeing to the change is reproduced as Appendix B to this brief.

[9] The Realty Advisory Board did succeed in getting such a requirement in its 2001 agreement with Operating Engineers Local 94 covering the stationary engineers in the New York City commercial buildings. The no-discrimination clause in the 2001 Operating Engineers agreement, with the pertinent language italicized, read as follows:

> "All claims alleging illegal discrimination under any of the above authorities shall be subject to the Agreement's grievance and Arbitration procedure as the final, binding, sole and exclusive remedy for such violations, *and employees covered by this Agreement shall not file suit or seek relief in any other forum.* This provision shall apply to allegations arising out of events occurring before and/or after the effective date of this Agreement. Arbitrators shall apply applicable law as it would be applied by the appropriate court in rendering decisions on discrimination claims." (emphasis added)

Commercial Building and Apartment Building agreements and the Contractors Agreement's no-discrimination clause was identical in all material respects to the no-discrimination clauses in those agreements.

As the bargaining history suggests and as the Defendants note, the standard no-discrimination clause in the Local 32BJ/Realty Advisory Board collective bargaining agreements was amended in 1999 to take account of this Court's decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). Pet. Br. 6. The point of those amendments was to provide that the Contract Arbitrator would have full authority to decide any statutory discrimination claim that the Union may present to him for decision and to issue an adequate remedy for any statutory violation found. Vesting the Contract Arbitrators with this authority allows Local 32BJ to seek full relief for any discrimination claims the Union may bring to arbitration. And, by virtue of the provision in the arbitration clause making "the award of the Arbitrator . . . final and binding upon the parties and the employee(s) involved," Pet. App. 45a, the employer is ensured, to the extent allowed by law, that any statutory discrimination claim decided by a Contractor Arbitrator cannot be relitigated by Local 32BJ or by the employee-grievant in court.

Of particular significance to the instant case, the amendments to the no-discrimination clause did *not* make any changes to the grievance-arbitration procedure itself. To the contrary, the amended no-discrimination provision states that it is precisely the "grievance and arbitration procedure [in] Articles V and VI" that would provide the means for addressing discrimination claims. Pet. App. 48a. As we have

shown, the contractual grievance-arbitration procedure provides that only Local 32BJ, and not the affected employee-grievant, has the right to bring a statutory discrimination claim to arbitration and that "[a]ll Union claims are brought by the Union alone." Pet. App. 46a. Thus, the amended no-discrimination clause does not constitute a written agreement allowing employees to arbitrate statutory discrimination, much less an agreement requiring employees to arbitrate such claims where the Union has declined to arbitrate them. Moreover, under the amended no-discrimination clause, as before, the arbitration clause provides that it is only "the award of the Arbitrator" that is "final and binding on . . . the employee(s) involved," Pet. App. 45a, and not a decision of the Union to decline to arbitrate a discrimination claim.

As the Realty Advisory Board recognized in its 2000 Apartment Building Agreement proposal, to legally bind the Union-represented employees to arbitrate all statutory discrimination claims, including those that are not brought to arbitration by the Union through the grievance-arbitration procedure, would be to require those employees to directly enter into bilateral arbitration agreements with their respective employers of the type addressed by this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). It was for this reason that the Board proposed to allow the covered employers to condition employment on employees entering directly into such bilateral agreements with their employers. As we have noted, the Union declined to agree to that proposal, and the Realty Advisory Board has not raised the matter again.

II. THE EMPLOYMENT DISPUTE UNDERLYING THIS CASE

The instant ADEA case arises out of the decision by 14 Penn Plaza LLC, the owner and manager of the building in which the Plaintiffs worked, to engage a firm specializing in building security to provide the security services that had previously been provided by Temco, the Plaintiffs' direct employer. Pet. App. 4a. In August 2003, Penn Plaza contracted with Spartan Security to perform the security functions. *Ibid.* As a direct result, Temco reassigned the Plaintiffs from their jobs as night watchmen at the 14 Penn Plaza building to other jobs with less opportunity for overtime pay. *Id.* at 4a, 16a.

Temco and 14 Penn Plaza LLC secured in advance the consent of Local 32BJ to contracting with Spartan Security to perform the security work. Pet. App. 4a. Local 32BJ agreed to Penn Plaza bringing in Spartan only after receiving assurances that the security work would be performed by a firm having wage rates in conformity with local industry standards.

The Plaintiffs requested Local 32BJ to file a grievance under the Contractors Agreement making three claims: first, that their reassignments constituted age discrimination on the ground that the Spartan employees assigned to serve as night watchmen at the 14 Penn Plaza building were younger; second, that Temco had failed to allocate overtime equitably; and third, that Temco had violated seniority in filling a vacancy. Pet. App. 4a, 16a-17a; JA 83, 89, 95-96.

Local 32BJ processed the grievance through the two steps of the grievance procedure. JA 51. Having exhausted the grievance procedure, the Union requested arbitration of all three claims made in the

grievance. Pet. App. 4a, 17a; JA 50-51. The Office of the Contract Arbitrator assigned Earl R. Pfeffer to be the Contract Arbitrator. JA 66. The hearing before Arbitrator Pfeffer on the grievance opened on February 2, 2004. JA 50.

Shortly after the arbitration hearings opened, the attorney representing Local 32BJ in the arbitration informed the Plaintiffs that the Union had decided to withdraw the age discrimination claim from arbitration. JA 83-84, 90, 96-97. Local 32BJ's attorney explained that the Union had consented to Spartan Security being brought in by 14 Penn Plaza LLC to provide the security services previously provided by Temco and that, in the Union's view, Spartan's actions in assigning the work to its own employees did not constitute age discrimination by Temco. *Ibid.* Thereafter, on February 23, 2004, Local 32BJ sent a letter to Arbitrator Pfeffer formally withdrawing the age discrimination claim from arbitration. JA 99.

Local 32BJ requested that the arbitrator decide the remaining two claims presented by the grievance. JA 99. Between March 2004 and March 2005, a number of hearings were held on those claims. JA 50 & n.1. On August 10, 2005, Arbitrator Pfeffer issued an award denying the grievance. JA 65.

In May 2004, the Plaintiffs filed charges with the Equal Employment Opportunity Commission alleging ADEA violations by Temco and 14 Penn Plaza LLC. Pet. App. 17a. In August 2004, the Plaintiffs filed suit against Local 32BJ claiming that the Union had breached its duty of fair representation by withdrawing the age discrimination claim from arbitration but withdrew that fair representation suit following the arbitrator's decision. *Id.* at 17a-18a. In June and September 2004, the EEOC dismissed the

Plaintiffs' age discrimination claims and issued right-to-sue letters. *Id.* at 5a. The Plaintiffs filed the instant age discrimination suit in September 2004. *Ibid.*

In response to the Plaintiffs' age discrimination lawsuit, the Defendants made a request that the Plaintiffs arbitrate their age discrimination claim before Arbitrator Pfeffer. JA 46. At the Defendants' request, Local 32BJ stipulated that, if the Plaintiffs and the Defendants came to an agreement to arbitrate the age discrimination claims, those parties could use the Office of the Contract Arbitrator as a forum for the arbitration, but only if those parties bore the expense themselves. Pet. App. 42a. The Plaintiffs – who felt that the Office of the Contract Arbitrator could not fairly decide their age discrimination claims, because the Defendants and the Union, which maintain the Office, had agreed to bring in Spartan to provide security at the 14 Penn Plaza building, JA 85, 91-92, 98 – declined the Defendants' request.

On November 23, 2005, the Defendants moved to compel the Plaintiffs to arbitrate their age discrimination claims. JA 40. The courts below denied that motion to compel arbitration. Pet. App. 5a-6a.

III. THE CONTRACTORS AGREEMENT DOES NOT PROVIDE FOR ARBITRATION OF THE ADEA CLAIM IN THIS CASE

Section 4 of the Federal Arbitration Act provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may petition for "an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. §

4. The "written agreement for arbitration" relied upon by the Defendants in moving to compel arbitration here is the sentence in the no-discrimination clause of the Contractors Agreement that states, "All . . . claims [of discrimination under this clause, including claims brought pursuant to an antidiscrimination statute,] shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations." Pet. App. 48a. *See* Pet. Br. 10, 40. The Defendants' reliance on the Contractors Agreement in that regard is misplaced.

The "grievance and arbitration procedure [in] Articles V and VI" of the Contractors Agreement does *not* provide for the arbitration of discrimination claims brought directly *by covered employees* against a covered employer. Rather, that grievance-arbitration procedure only provides for the arbitration of discrimination claims as "Union claims" that may be "brought by the Union alone." Pet. App. 46a. And, the Union has refused to take the Plaintiffs' discrimination claim to arbitration.

Given the Union's control over employee discrimination claims in the "grievance and arbitration procedure [in] Article V and VI" of the Contractors Agreement, Pet. App. 48a, the Plaintiffs had no contractual right or ability "to arbitrate [their ADEA claims] under [that] written agreement for arbitration," 9 U.S.C. § 4. What is more, "an order directing that . . . arbitration proceed," where the Union has not requested such arbitration, would *not* be an order directing that "arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. For "arbitration [to] proceed in the manner provided for in [that] agreement," 9 U.S.C. § 4, the Union must request arbitration of the discrimination claims as a

"*Union claim*[]." Pet. App. 46a. Since the Union has not requested arbitration, the Contractors Agreement does not provide a basis for ordering arbitration of the Plaintiffs' ADEA claims.

Arbitration of the Plaintiffs' age discrimination claims through the procedures provided in the Contractors Agreement has not been requested for the simple reason that there is no dispute between Local 32BJ and the Defendants over those claims. The Union and the Defendants both believe that the Plaintiffs' claims lack merit. That being so, there are *no* "differences arising between the parties" as to the age discrimination claims for "a Contract Arbitrator to decide." Pet. App. 43a. "[T]he grievance and arbitration procedure [in] Articles V and VI" of the Contractors Agreement most certainly does not provide for arbitration of discrimination claims that the Union has specifically declined to present for arbitration on the grounds that the Union believes the claims lack merit.

This understanding of the grievance-arbitration procedure is reinforced by the nature of the panel of Contract Arbitrators provided in the agreement. The arbitrators on this panel are chosen by Local 32BJ and the Realty Advisory Board and can be removed from the panel by either the Union or the Board for any reason. Pet. App. 47a. That being so, as the Plaintiffs observed in declining to arbitrate, JA 85, 91-92, 98, a Contract Arbitrator drawn from the Office of the Contractor Arbitrator panel might not be entirely impartial in ruling on an employee grievance that both the Union and the employer have concluded lacks merit.

The Union's permission for the Plaintiffs and the Defendants to use the Office of the Contract Arbitra-

tor did not constitute a request for arbitration pursuant to Article VI of the agreement. To the contrary, the Union made clear in granting permission that any such arbitration would be solely a matter between "the parties to this lawsuit" and that the Union would not have any of the responsibilities it would normally have with respect to an arbitration under the collective bargaining agreement Pet. App. 42a. The Union's permission merely allowed the Plaintiffs and Defendants to utilize the Office of the Contract Arbitrator to resolve their ADEA dispute – if they independently agreed on arbitration as a substitute for litigation as their preferred means of resolving their dispute. In other words, the Union, as one of the partners to the Office of the Contract Arbitrator, was merely agreeing that the Office's panel of arbitrators could be available to arbitrate the dispute between the Plaintiffs and the Defendants in the same manner as employers who are not members of the Realty Advisory Board utilize that Office to arbitrate disputes arising under their agreements.

In sum, the Contractors Agreement does not bind covered employees to arbitrate discrimination claims that Local 32BJ has declined to advance to arbitration through "the grievance and arbitration procedure [in] Article V and VI." Pet. App. 48a. That being so, the courts below correctly denied the Defendants petition to order the Plaintiffs to arbitrate their ADEA claims pursuant that agreement.

CONCLUSION

The decision of the courts below denying the motion to order arbitration should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

ARTICLE V
Grievance Procedure

1. The parties shall provide for a grievance procedure to perform the following functions:

(a) To endeavor to adjust all issues not covered by and not inconsistent with any provision of this Agreement and which the parties are not required to arbitrate under the terms of this Agreement.

(b) To endeavor to adjust without arbitration any issue between the parties which under this Agreement the parties are obligated to submit to the Arbitrator. The cost of administering Step II Grievance Meetings, including the retention of a mediator to facilitate resolution of grievances, shall be borne equally by the RAB and the Union.

2. (a) The grievance may first be taken up directly with a representative of the Employer and a representative of the Union.

(b) If the grievance is not resolved it may be presented for resolution at a Step II Grievance Meeting. Counsel for the Union and the Employer may be present at any grievance procedure meeting.

(c) If a grievance is not resolved through the steps of the grievance procedure it may be submitted to the Arbitrator, who shall be authorized to take jurisdiction upon the request of either party if there shall be unreasonable delay

in the processing of the grievance.

(d) Any grievance, except as otherwise provided herein and except a grievance involving basic wage violations, including Pension, Health, Training, Legal and/or SRSF contributions as set forth in Article X, shall be presented to the Employer in writing 120 days of its occurrence, except for grievances involving suspension without pay or discharge, which shall be presented within forty-five (45) days, unless the Employer agrees to an extension, or the Arbitrator finds one should be granted for good cause shown.

APPENDIX B

April 19, 2000

BY HAND

James Berg
President, Realty Advisory Board
292 Madison Avenue
New York, NY 10017

RE: 2000 Apartment Building Agreement

Dear Jim:

During the Apartment Building agreement negotiations, the Union agreed to conform the anti-discrimination language contained in the 1997 Apartment Building agreement to reflect the anti-discrimination language in the 1999 Commercial Building Agreement. Those modifications were not intended to alter or change the parties' understanding set forth in the 1997 Apartment Building agreement. Rather, they reflected the parties' intention to carry forward their original understanding set forth in the 1997 Apartment Building agreement in response to intervening court decisions.

As I expressed to you during the negotiations, I am not entirely comfortable with the principle that a worker will be limited in his or her choice of forum in which to pursue statutory claims of discrimination.

However, notwithstanding these reservations, in the light of the bargaining history set forth above, the Union agreed to continue the parties' prior understanding into the current Apartment agreement

This agreement was based on our joint commitment to diversify the panel of arbitrators to better reflect the Union's membership, to develop procedures appropriate for such cases, and to evaluate our experience in connection with these claims at the conclusion of this agreement and in light of any subsequent court decisions.

Sincerely,

Michael P. Fishman, Trustee
Local 32B-32J, Service Employees
International Union

AGREED
By:_____
James Berg, President, Realty Advisory Board